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In the

Supreme Court of the United States

October Term, 1950

No._____

STATE OF GEORGIA, Petitioner

v.

J. B. WENGER, Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh District

To the Honorable The Chief Justic of the United States and the Associate Justices of the Supreme Court of the United States:

The State of Georgia prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on February 23, 1951.

I.

OPINIONS BELOW

The opinion of the District Court (R. 15-23.) is reported in 94 Fed. Supp. 976. The opinion of the Court of Appeals (R. 33-37.) is reported in 187 Fed. 2d. 285.

II.

JURISDICTION

The judgment of the Court of Appeals was entered on February 23, 1951. (R. 38.) A petition for rehearing filed on March 9, 1951 (R. 39-49.) was denied March 22, 1951. (R. 51.) The jurisdiction of this Court is invoked under 28. U.S.C., Section 1254 (1).

III.

QUESTIONS PRESENTED

Whether a State (alleging violation of its liquor laws) may maintain, in a Federal District Court, a civil action ex delicto against a citizen of another State for violation of the prohibitions of Section 2 of the Twenty-first Amendment and of Section 122 of Title 27 of the U.S.C.; more specifically:

1. Does the plaintiff State assert a right having an immediate basis in and arising under the Constitution and laws of the United States?

2. Does Section 2 of the Twenty-first Amendment by virtue of its own force, or as implemented by the Webb-Kenyon Act (49 Stat. 877; 27 U.S.C. Section 122), create a right in the plaintiff State which is civilly enforceable?

3. Should not the District Court (jurisdiction found to exist) have proceeded to adjudicate the plaintiff's claim to relief based upon non-Federal rights notwithstanding a decision adverse to plaintiff upon the Federal claim?

IV.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent Constitutional and statutory provisions are printed in Appendix A, Infra, p. 20.

V.

THE STATEMENT

A civil suit for damages was filed by the State of Georgia against J. B. Wenger, a citizen of Illinois, in the United States District Court for the Eastern District of Illinois on March 29, 1950. (R. 3.) This action was brought by the State of Georgia to recover damages caused by an unlawful conspiracy and acts done in furtherance of that conspiracy. (R. 3-7.) Before answering the complaint, defendant moved to dismiss for want of jurisdiction of the action and for failure to state a claim upon which relief can be granted. (R. 11.) The motion to dismiss was filed May 1, 1950. Additional grounds of the motion to dismiss were either cured by plaintiff's amendment to the complaint (R. 13.) or were not passed upon by the District Court as being unnecessary to the rendition of a final judgment. The District Court determined that jurisdiction existed, but dismissed the complaint upon its merits as failing to state a Federal claim upon which relief can be granted and declined to decide whether a sufficient claim was stated under State law. (R. 13-23.) The judgment of the District Court was entered on July 22, 1950. (R. 24.) The origin of the errors relied upon arise out of this ruling dismissing the complaint.

In substance, the complaint (R. 3-7.) charged that

defendant agreed and conspired with other persons to ship and transport distilled intoxicating liquor from Illinois to Georgia, which liquors were intended to be received, possessed, sold and used in violation of the laws of Georgia. Pursuant to his agreement and conspiracy, defendant did ship and transport, and cause to be shipped and transported into Georgia 26,356 cases of such liquor to consignees who were by Georgia law prohibited from receiving, possessing, or reselling such liquor, but who did, nevertheless, illegally receive, possess and resell the same. None of Georgia's warehouse charges or excise taxes were paid upon any of this liquor and Georgia was defrauded of these warehouse charges and taxes aggregating $395,340.00 upon the quantity of liquor so shipped. Plaintiff seeks to recover judgment for this amount.

Plaintiff predicated her claims on the jurisdiction of the District Court upon the existence of a Federal question. The conspiracy had as its object and purpose, according to the complaint, the violation of the prohibition contained in Article 2 of Amendment XXI to the Constitution of the United States and the violation of the prohibition contained in the re-enacted Webb-Kenyon Act (49 Stat. 877; 27 U.S.C. Section 122). It is the theory of Georgia's case that Section 2 of the Twenty-first Amendment, alone or in conjunction with the Webb-Kenyon Act, creates an actionable right in the State of Georgia.

The Court of Appeals for the Seventh Circuit, court below, in an opinion (R. 33-37.) affirmed the judgment of the District Court and entered a judgment on February 23, 1951. (R. 38.)

The State of Georgia petitioned the Court of Appeals for a rehearing on March 9, 1951 (R. 39-49.) admitting that her claim on Federal grounds was a question

which the Courts have never been previously asked to decide, but urging that Court to modify its opinion to permit a decision on Georgia's claim upon the non-Federal grounds, suggesting the existence of a probable conflict with decisions of this Court to do otherwise and certain conflict with decisions of other Courts of Appeal. It was further urged in the Court below (R. 47.) that, even if that Court held that jurisdiction of the claim on non-Federal grounds was discretionary, this case should not be dismissed for the reason that the only Federal Court available to a Plaintiff State upon a basis of diversity is this Court and that this Court should not be asked to try this case as an original suit[1] unless all other Federal forums have failed.

The Court below denied the petition for rehearing March 22, 1951. (R. 51.)

VI.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In failing to hold that Section 2 of the Twenty-first Amendment alone, or as implemented by the Webb-Kenyon Act (49 Stat. 877; 27 U.S.C. Section 122), had as its purpose the protection of the States against importation of intoxicating liquor in violation of State laws; thereby creating a right in the States.

2. In failing to hold that where Constitutional and statutory rights are violated, the Federal Courts should frame or adjust remedies to grant necessary relief appropriate with the traditional concepts of Anglo-American law.

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[1] Constitution of the United States, Article III, Section 2; 28 U.S.C. 1251.

3. In failing to hold that the District Court, having found jurisdiction to exist, should have proceeded to adjudicate plaintiff's claim to relief upon non-Federal rights notwithstanding a decision adverse to plaintiff upon the Federal claim.

4. In failing to hold that relief on the non-Federal claim may be had at law as well as in equity, at the common law as well as by statute.

5. In affirming the judgment of the District Court.

VII.

REASONS FOR GRANTING THE WRIT

1. *There exists a direct conflict between the decisions of the Court below and the decisions of several Courts of Appeal.*

The conflict arises over the effect to be given the rule of this court announced in *Siler v. Louisville and Nashville R. Co.*, 213 U. S. 175 and *Hurn v. Oursler*, 289 U. S. 238, recently reaffirmed.[2] The court below in the instant case (reported as 187 Fed. 2d. 285) at page 287 stated the above rule to be "that when, by virtue of a substantial Federal question, a Federal court obtains jurisdiction, it must proceed to decide all the questions in the case even though it decides the Federal question adversely to the parties raising the question."

No apparent conflict exists between circuits as to the statement of this rule but there exists a lack of uniformity of judgment in cases where an invocation of the so-called *Siler* and *Hurn* doctrine is sought be-

[2] Armstrong Paint and Varnish Works v. Nu-Enamel Corporation, 305 U.S. 315, and Hillsborough Twp. v. Cromwell, 326 U. S. 620, 622.

cause of the divergent application of the rule by various circuits.

The court below, after restating the doctrine of the *Siler* and *Hurn* cases, held that a dismissal of a claim as based on Federal grounds, upon a motion to dismiss, amounts to a dismissal of the whole case including the claim as based on non-Federal grounds. In so holding the court below stated that where the district court upon a motion to dismiss "determined that the allegations of the complaint did not state a claim under the Federal Constitution or laws upon which relief could be granted . . . (and) . . . disposed of the case on the Federal ground upon which jurisdiction was based" the claim on the non-Federal ground fell with the dismissal of the Federal ground. Reliance was placed on *Bell v. Hood, D. C.*, 71 Fed. Supp. 813, and *Massachusetts Universalists Convention v. Hildreath and Rogers Co.*, 1 Cir., 183 Fed. 2d. 497, 501.[3]

This petitioner perceives the above holding to be in direct conflict with decisions of the Second and Ninth Circuits in the cases of *Fay v. Douds*, 2 Cir., 172 Fed. 2d. 720; *Casey v. American Export Lines, Inc.*, 2 Cir., 176 Fed. 2d. 337; *Markert v. Swift and Co.*, 2 Cir., 187 Fed. 2d. 104; *Southern Pacific Co. v. Van Hoosier*, 9 Cir., 72 Fed. 2d. 903; and *Southside Theaters v. West Coast Theater Corporation*, 9 Cir., 178 Fed. 2d. 648.

Chief Judge Learned Hand, in *Fay v. Douds*, supra, (where a motion to dismiss was directed to a petition which asserted a claim on both Federal and non-Federal grounds) stated the rule as interpreted by, and adhered to in, that Circuit as follows:

"If this assertion of constitutional right is not

[3] Plaintiff in her petition for rehearing in court below urged that reliance upon the above authority as support for the proposition there stated was inappropriate. (R. 47)

> transparently frivolous, it gave the District Court jurisdiction; and, having once acquired jurisdiction, the court might, and should, dispose of all other questions which arose, even though they would not have been independently justiciable. Although, as will appear, we do not think that . . . (the plaintiff) . . . was denied any constitutional right, we do think that its contention is not so plainly untenable that the District Court might not proceed to decide the other issues involved."

In *Markert v. Swift and Co.*, supra, after quoting from the *Hurn* case, the Second Circuit held in an employee's action against the employer for overtime compensation and liquidated damages under the Fair Labor Standards Act, that a count alleging that the employer had a duty to furnish sterile uniforms to plaintiffs at employer's expense, either on grounds based on contractual agreement or based on regulations of Department of Agriculture (the latter ground presented Federal question), alleged two grounds for a single cause of action rather than two separate and distinct causes of action. Such a holding conflicts with the decision below.

In direct conflict with the judgment of the court below, which held that a dismissal on the Federal ground dismisses the whole case, is the case of *Casey v. American Export Lines, Inc.*, supra, where the Second Circuit in an opinion per curiam, after finding no merit in a claim on Federal grounds, returned the case to the District court in order to permit the plaintiff to urge an adjudication upon the non-Federal grounds.

The Ninth Circuit in *Southern Pacific Company v. Van Hoosier*, 72 Fed. 2d. 903, gives the same effect to the pragmatic rule of the *Siler* and *Hurn* cases as is

accorded by the Second Circuit. The plaintiff in the *Southern Pacific Company v. Van Hoosier* case brought an action for freight charges on the theory that the interstate rate was applicable and that the intrastate rate was inapplicable. The defendant admitted owing the lesser intrastate rate. Jurisdiction was based upon the Federal question presented by an action to recover rates established under the Interstate Commerce Act. The Federal question was decided adversely to the plaintiff, but nevertheless, the court rendered a judgment against the defendant for the amount of his admitted indebtedness, following the reasoning of *Siler* and *Hurn* cases. This principle was recently reaffirmed in the Ninth Circuit in the case of *Southside Theaters v. West Coast Theater Corporation*, 178 Fed. 2d. 648.

In none of the foregoing opinions in the Second and Ninth Circuits, which give effect to the *Siler* and *Hurn* decisions of this court, is there intimated that the District Court is deprived of "jurisdiction" of the non-Federal questions because the Federal questions are dismissed upon motion, nor is there intimated that the District Court exercises a discretion as to an adjudication of the claim based on non-Federal grounds. In fact, as noted in *Fay v. Douds*, supra, the Second Circuit held that the District Court should dispose of *all* other questions which arose even though they would not have been independently justiciable.

While the court below does not expressly hold that "jurisdiction" of the claim on non-Federal grounds is discretionary, its reliance upon *Massachusetts Universalists Convention v. Hildreath and Rogers Co.*, supra, might seem to so indicate. In this regard, it is significant to note that in *Massachusetts Universalists Convention v. Hildreath and Rogers Co.*, supra, Judge

Frank in his concurring opinion states that were he sitting in the Second Circuit, he would not feel obligated to follow the rule of discretion as indicated in the concurring opinion of *Strachman v. Palmer*, 1 Cir. 177 Fed. 2d. 427, which was approved by the First Circuit in *Massachusetts Universalists Convention v. Hildreath and Rogers Co.*, supra.

The view taken by the court below is not only in conflict with the views of other circuits but is in probable conflict with the decisions of this Court in the *Siler* and *Hurn* cases, and the cases which follow them. For certainly, if, as in the court below, the "whole case" is to fail because of what is deemed to be an unsound legal position on the Federal grounds (although for jurisdictional purposes found to be substantial and not frivolous) rather than to fail because no substantial identity of right or proof is shown, then *Siler* and *Hurn* can have no meaning, for under the decision below, regardless of how closely the facts, proof, and legal positions may be related, a dismissal based on the Federal grounds deprives the court of "jurisdiction" to adjudicate the "whole case." There can be no doubt but that the judicial power of the United States extends to the "whole case" as based on Federal and non-Federal law.[4]

(a) *Aspects of the above doctrine not here applicable.*

The rule of the so-called "constitutional cases" that local questions involving substantial State policy should be held in abeyance until local questions are authoritatively adjudicated by the State court[5] is not applicable to the instant case because no unsettled

[4] Osborn v. The Bank of the United States, 9 Wheat. 738, 822.

[5] Railroad Commission of Texas v. Pullman Company, 312 U. S. 496; Spector Motor Service v. McLaughlin, 323 U. S. 101.

matters of State policy are involved, furthermore this case is not susceptible of being split into two law suits since there is an identity of proof and an identity of right asserted based both upon Federal and non-Federal grounds, placing it squarely within the *Siler* and *Hurn* decisions.

The difficulties that arose early after the *Hurn* case as to what is to be deemed a part or ingredient of a single "case" or "cause of action" and what guide posts show the way through this uncertainty[6] are not here present since neither the court below nor the District court, whose decision it affirmed, evinced any opinion in that regard since such questions were never reached because of the holding that dismissal of the Federal grounds upon a motion to dismiss amounts to a dismissal of the whole case.

2. *The questions presented by this case are of paramount importance.*

(a) *Important constitutional issues.* Clearly, the question of whether the clear and unambiguous language of the Twenty-first Amendment by virtue of its own force, or as implemented by the Webb-Kenyon Act, creates actionable rights in the States, is a question of great and far-reaching importance. A settlement of this question by this court is plainly in the public interest, since it affects all of the States in the enforcement of their respective liquor laws. The force and effect to be given this provision of statutory and constitutional language is particularly in the public interest in view of the recent investigation conducted by the

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[6] See, for instance, Lewis v. Vendome Bags, 108 Fed. 2d. 16; Treasure Imports, Inc. v. Henry Amdur & Sons, Inc., 127 Fed. 2d. 3; Musher Foundation, Inc. v. Alba Trading Co., Inc., 127 Fed. 2d. 9; Zalkind v. Scheinman, 139 Fed. 2d. 895.

Special Senate Committee on Organized Interstate Crime, popularly known as the Kefauver Committee, whose interim reports to Congress focus attention on the inability of States to cope with conspirators beyond their boundaries who confederate with and provide inducement for violators located within the State borders.

(b) *The questions presented are important because of the nature of one of the parties.*

Since the plaintiff is a State which may proceed by original suit in this court, it is important that this court should grant certiorari so that plaintiff may comply with the express desires of this Court that all available Federal forums fail before a petitioner files an original suit. It was urged in the court below that this was one of the strongest reasons against a dismissal in this case and that the court below should be reluctant not to adjudicate the whole case. (R. 47-48.)

3. *The decision of the court below was erroneous.*

Petitioner believes the decision below to be erroneous, moreover, it is believed that that decision in all probability conflicts with applicable decisions of this court for the reasons specified as errors herein previously assigned and now treated somewhat more fully.

(a) *It is Georgia's contention that Section 2 of the Twenty-first Amendment by its own force creates a Federal right or interest in the plaintiff.*

The plain language of the section purports to forbid and prohibit the acts of the defendant described in the complaint. This Court's views, as understood by this petitioner, treat the prohibitory words of Section 2 of the Twenty-first Amendment as Federal law command-

ing obedience, notwithstanding the absence of a criminal penalty.[7]

Section 2 of the Twenty-first Amendment being plain and unambiguous, its language should be literally applied. This court has commented upon the clarity of the language contained in Section 2 of the Twenty-first Amendment and has refused even to discuss reading into this clear language a limitation based upon the court's decisions applying to the Wilson Act, the Webb-Kenyon Act and the Reed Amendment.[8]

It has long been a rule of construction that where the language is plain, there is an end to construction, and the statute, or constitutional provision, is taken to mean what it says. The strongest reasons dictate giving the constitution a broader and more objective interpretation than is accorded a statute.[9]

The Twenty-first Amendment was adopted for the benefit and protection of the States. The central government, although supreme in its enumerated powers, was not created to be an opponent or rival of State governments, but was created to supplement and to protect them. Thus, on numerous occasions, States in the exercise of their general police power have been given aid in the protection of their borders by the Congress which in such instances has expressed a plain purpose to make State enforcement of police powers effective. States in the exercise of their police power regulate the stealing of automobiles, but Congress supplementarily forbids and prohibits interstate transportation of stolen cars. *Brooks v. U. S.*, 267 U. S. 432.

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[7] Carter v. Virginia, 321 U. S. 131, 138; Duckworth v. Arkansas, 314 U. S. 390, 397.

[8] See, for instance, State Board of Equalization v. Young's Market, 299 U. S. 59, 63, 64; Mahoney v. Joe Triner Corp., 304 304 U. S. 401, 404.

[9] Lake County v. Rollins, 137 U. S. 662, 670.

States may forbid the sale of convict-made goods within their borders and the Congress by the Ashurst-Sumners Act made unlawful the interstate transportation of such goods. *Kentucky Whip and Collar Co., v. Illinois Central R.R. Co.*, 299 U. S. 334.

The Lottery Act supplements in the Federal domain a police power residing in the States. *Champion v. Ames*, 188 U. S. 321.

Regulations in the interest of public health are an exercise of State police power but in the case of the Filled Milk Act, Congress has supplemented State regulations. *Carolene Products Co. v. U. S.*, 323 U. S. 18. Congress by the Mann Act and the Federal Kidnapping Act has supplemented State enforcement of local white slave and kidnapping laws. *Hoke v. U. S.*, 227 U. S. 307; Chatwin v. U. S., 326 U. S. 455.

By the Jenkins Act, Congress has co-operated with the States in the collection of State taxes upon the sale and use of cigarettes. *Consumer Mail Order Association v. McGrath*, 94 Fed. Supp. 705; affirmed by this Court, No. 508 of the October Term, 1950.

It can hardly be contended that the States were not the intended beneficiaries of the Twenty-first Amendment. The Federal creation of actionable legal rights in the States is by no means unknown. But for the provision of Article III, Section II of the Constitution of the United States conferring upon the Supreme Court jurisdiction of controversies between two States, there is no source from which a right of action of one State against another is derived.[10] Not only may actionable Federal rights be established by and derived

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[10] Missouri v. Illinois, 200 U. S. 496.

from the Constitution, but upon occasion they are derived from Federal Statute.[11]

The Webb-Kenyon Act was not a mere delegation of power to the States, but a regulation of commerce; and none of the decisions holding that the Webb-Kenyon Act relieved the States of th .imitations placed by the commerce clause on their powers over the transportation or importation of intoxicants ruled that the Act had no other result or effect. This is a point of first impression and plaintiff submits that it may be maintained on principle and on precedent.[12]

By way of summary on this point it can be hardly doubted but that the plain language of both the constitutional provision and the statute, here in question, give plaintiff State a standing which entitles her to relief based on the right or interest created by the Constitution and laws of the United States. See concurring opinion of Mr. Justice Frankfurter in *Anti-Fascist Refugee Committee v. McGrath* — U. S. —, 95 L. Ed. (adv. ops.) 561, 576.

(b) *It is Georgia's contention that where constitutional and statutory created rights are violated, the Federal courts should frame or adjust remedies and grant necessary and appropriate relief.*

The violation of the right or interest created and guaranteed by the Twenty-first Amendment and the Webb-Kenyon Act is an appropriate subject for judicial redress and is, therefore, actionable.

For every legal right there exists a legal remedy

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[11] Georgia v. Pennsylvania Railroad, 324 U. S. 439; Georgia v. Evans, 316 U. S. 159.

[12] Clarke Distilling Company v. Western Marylond RR. Co., 242 U. S. 311, 326; Adams Express Co. v. Kentucky, 238 U. S. 190; Vance v. Vandercook, 170 U. S. 438; McCormick and Co. v. Brown, 286 U. S. 131, In Re. Rahrer, 140 U. S. 545.

for the invasion of that right. As early as 1803, the Supreme Court considered this proposition in the famous case of *Marbury v. Madison*, 1 Cranch, 137. There the court concerned itself, among other things, in determining whether Marbury had a right of action for mandamus. Although statute law of the United States then of force referred to the writ of mandamus as one within the judicial power of the Supreme Court, no statute purported to give to any class of litigants a legal right to sue for and obtain the writ. Notwithstanding this statutory vacuum the court decided that Marbury was entitled to have the writ to enforce his federal right. At page 162 the Court said in that connection:

> "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."

In *Texas, etc. Ry Co. v. Brotherhood of Ry. Clerks*, 281 U. S. 548, this Court considered a suit for injunction against acts plainly prohibited by the Railway Labor Act of 1926 but for which no penalty or other remedy was provided. Chief Justice Hughes, for the full bench, said that this prohibition cannot be overridden and as it is capable of enforcement, it must be enforced. He disposed of the point upon the authority of *Marbury v. Madison*, saying:

"The right is created and the remedy exists . . ."

Such illustrations of judicial redress in the absence of a statute creating a right of action could be multiplied by numerous physical precedents where, for example, national banks have maintained actions on contracts and on torts, seeking legal and equitable relief

on the basis of the Federal question presented by the Federal origin of their charters and unaided by Federal statutes declaring their claims actionable. Perhaps more pointed as authority are those cases where Federal Courts have permitted recovery of taxes illegally collected upon the theory of a quasi-contract right although not by statute made recoverable upon such theory. *Dooly v. U. S.* (1901), 182 U. S. 222, is of this class. And see cases there cited at pp. 228-230.

This court, in *Bell v. Hood*, 327 U. S. 678, recently had occasion to decide whether a suit brought against F.B.I. agents for money damages and alleging violation of the 4th and 5th Amendments presented a substantial Federal question sufficient to withstand a motion to dismiss on the ground that the cause of action was patently without merit.

After deciding that the cause was neither frivolous nor immaterial, this court concluded that the claim asserted there under the 4th and 5th Amendments presented a substantial Federal question sufficient to withstand a motion to dismiss on the ground that the cause of action was patently without merit.

After deciding that the cause was neither frivolous nor immaterial, this court concluded that the claim asserted there under the 4th and 5th Amendments presented a substantial question which had never been decided. The nature of the Bill of Rights having long been established and well understood when the case was decided.[13]

In *Jackson County v. U. S.*, 308 U. S. 343, this court dealing with a treaty right which inured to the benefit

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[13] Boyd v. United States, 116 U. S. 616, which held that Amend. 1 through 8 created no new rights, but simply limited the powers of the Federal Government.

of Indian wards and of the fact that Congress failed to provide specifically the nature and extent of relief to be afforded for its violation, said:

> "[It] has left such remedial details to judicial implication. Since the origin of the right to be enforced is the treaty, plainly whatever rule we fashion is ultimately attributable to the Constitution, treaties, or statutes of the United States."

The foregoing examples are illustrious of this Courts historic and continued effort to frame and adjust remedies for the protection and enforcement of Federally created rights and interests where a statutory right of action has not been provided. Such remedial action by the Judiciary is necessary, otherwise Congressional inaction would have the effect of overriding constitutionally vested and protected rights.

(c) *It is Georgia's contention that the District court, having found jurisdiction to exist, should have proceeded to adjudicate the whole case including the plaintiff's claim to relief upon non-Federal grounds notwithstanding a decision adverse to the plaintiff upon Federal grounds.*

When jurisdiction is invoked upon the basis of a Federal question and when the court finds in favor of its jurisdiction because of the existence of a substantial Federal question, but nevertheless decides that no Federal claim has been stated upon which relief can be granted, it should nevertheless retain jurisdiction to determine whether plaintiff is entitled to relief upon the same cause of action based upon applicable non-Federal law. *Siler v. The Louisville and Nashville R. R. Co.*, 213 U. S. 175; *Moore v. New York Cotton Exchange*, 270 U. S. 593; *Hurn v. Oursler*, 289 U. S. 238. Also to the same effect, *Green v. Louisville & I. R. Co.*,

224 U. S. 499; *Chicago Great W. R. Co. v. Kendall*, 266 U. S. 94, 97, 98; *Risty v. Chicago R. I. & P. Ry Co.*, 270 U. S. 378, *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103; *Armstrong v. Nu-Enamel Corp.*, 305 U. S. 315; *Hillsborough Twp. v. Cromwell*, 326 U. S. 620, 629.

Inasmuch as the tortious conspiracy here alleged by the plaintiff is inseparable from the Constitutional and statutory violations, it would appear that a failure to establish a claim based upon the Federal violation would not deprive the plaintiff of relief on her claim for damages arising from tortious conspiracy as based on the non-Federal grounds.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPNDIX A

Section 2 of Amendment XXI of the Constitution of the United States:

> "The transportation or importation into any State, territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited."

Webb-Kenyon Act (49 Stat. 877):

> "The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory ,or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited." (Mar. 1, 1913, c. 90, 37 Stat. 699: Aug. 27, 1935, c. 740, § 202 (b), 49 Stat. 877.) . . . 27 U.S.C.A. Sec. 122.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 130

STATE OF GEORGIA, *Petitioner,*

v.

J. B. WENGER, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

J. B. Wenger, respondent, prays for denial of a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on February 23, 1951, and presents this, his brief in opposition to the petition for such writ by the State of Georgia.

I.

OPINIONS BELOW.

The opinion of the District Court (R. 15-23.) is reported in 94 Fed. Supp. 976. The opinion of the Court of Appeals (R. 33-37.) is reported in 187 Fed. 2d. 285.

II.

JURISDICTION.

The jurisdiction of this Court has been invoked by the petitioner under Title 28, U.S.C., Section 1254 (1) and in the District Court under Title 28 U.S.C. Section 1331.

III.

QUESTIONS PRESENTED.

1. Does the Twenty-first Amendment to the Constitution of the United States, or the Webb-Kenyon Act (27 U.S.C., Section 122) create or authorize a civil tort action by a State against a resident of another State for violation; and more specifically, is such an action created where the damages alleged are the loss of taxes and fees claimed to be imposed or due, only under the laws of the Plaintiff State?

2. Where a Federal District Court, in a suit by a citizen of another State, has considered the pleadings and determined that no Federal question exists, is it required to retain jurisdiction, (a) for the purpose of determining whether purely State questions exist, where not clearly apparent, and (b) for the purpose of enforcing purely State penal and tax laws?

IV.

REASONS FOR DENIAL OF THE WRIT.

1. The Twenty-first Amendment to the Constitution, Section 2, and the Webb-Kenyon Act (Section 122, Title 27, U.S.C.) divest liquor of its interstate character in certain cases; but do not create or authorize any cause of action either civil or criminal.

At no stage of the proceedings in this cause has the petitioner cited an authoritative case or other precedent, which will support the cause of action, which its complaint purports to describe.

The respondent knows of no authority supporting the action, and on the contrary states that the prior decisions of this Court support the conclusion of the District Court, and of the Court of Appeals, to the effect that the alleged action does not exist.

The petitioner seeks to induce the Federal Courts to create a basis for entertaining the action by adopting a new and unwarranted theory.

The District Court below in its memorandum opinion, found, under authority of *Bell* v. *Hood,* 327 U. S., 678, that it must accept jurisdiction of the cause to determine the pleadings. (R. 17-18)

Both the District Court and the Court of Appeals examined the cases cited by the petitioner, in support of the contention that it has a cause of action under the Twenty-first Amendment, Section 2, and the Webb-Kenyon Act, and found, on the basis of cases heretofore decided by this Court, *McCormick* v. *Brown,* 286 U. S. 131; *Duckworth* v. *Arkansas,* 314 U. S., 390; *Carter* v. *Virginia,* 321 U. S. 131; and *U. S.* v. *Frankfort Distilleries,* 324 U. S., 293, that no cause of action accrues under these Sections, and that the Twenty-first Amendment, Section 2, and the Webb-Kenyon

Act accomplished but one purpose, that it, to relieve the States of the limitations of the commerce clause on their powers over transportation or importation of alcoholic liquor.

Neither the Twenty-first Amendment nor the Webb-Kenyon Act, by their own terms, prescribe any penalties for violation, and neither defines or asserts any cause of action.

The petitioner argues, at Page 13 of its petition, that the Twenty-first Amendment was adopted for the benefit and protection of the States, and infers that it is the creation of the Central Government. This, however, ignores the fact that the Twenty-first Amendment was adopted and ratified by action of the States, and was in effect, a revocation of power granted by the States under the commerce clause of the Constitution.

The Twenty-first Amendment, Section 2, uniformly has been construed as having the same effect as the Webb-Kenyon Act, which was entitled "An Act Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases."

In *Dunn* v. *U. S.* 98 F. 2d, 119, at Page 124, Judge Williams, dissenting, quotes from the Congressional Record, and shows substantial ground for the belief that the purpose of proposing Section 2 of the Twenty-first Amendment to the Constitution, was to guard against the possibility that the Webb-Kenyon Act might be held unconstitutional in some future tests, and that prior decisions upholding state regulation of liquor transportation might be overruled by the courts.

The Liquor Enforcement Act of 1936, formerly at Section 221 *et. seq.,* Title 27, U.S.C., now contained in Section 1262 of the New Title 18, Crimes and Criminal Pro-

cedure, U.S.C., effectively shows that the Congress considered it necessary to adopt legislation to create a cause of action for criminal violations against the philosophy of the Twenty-first Amendment, Section 2, *Dunn* v. *U. S.* 98 F. 2d. 119. The causes of action, however, are a criminal action by the United States, and a civil action for forfeiture on behalf of the United States. No cause of action whatsoever was created on behalf of any state, or any other party.

Petitioner has argued at Pages 13 and 14 of its petition, that the Congress has adopted many acts to supplement the States in the execise of their general police power, and cites the Federal laws prohibiting interstate transportation of automobiles, convict made goods, lottery tickets, filled milk, kidnapped persons, women for purposes of debauchery, and the statute requiring filing of reports on interstate sales of cigarettes.

The petitioner does not, however, contend in its petition, that any of these acts would authorize a State to bring an action in tort for civil damages because a stolen automobile, or filled milk, or cigarettes were transported into the State in violation of such Federal penal statutes.

The only damages claimed by the petitioner, a sovereign State, is the loss of taxes claimed to be imposed only under Georgia statutes.

The appendix to the complaint, and incorporated as part of it, is a pamphlet, contained at Page 9 of the Record. This pamphlet purports to contain the laws and regulations of the State of Georgia relating to distilled spirits.

The theory of control set up by the Georgia Statute appears to be such that, all liquor imported into the State must be delivered to a State warehouse, which shall

impose certain warehouse charges and taxes upon the liquor, and which shall require payment of said taxes and charges before the liquor is released. Thus, the tax and charges are imposed upon the liquor itself, rather than upon any person. Along with such provisions are criminal sections providing that it is a violation of the Georgia law to accept liquor, except through the State warehouses (Page 6 of Pamphlet). It is also provided that the liquor and the vehicle carrying it may be confiscated by the State of Georgia, if it is imported into Georgia other than through the State warehouses. These are the controls, methods and sanctions which the legislature of the State of Georgia has seen fit to impose.

There is no authority in the statute, as contained in the complaint, for a civil suit for damages against persons who are considered to have avoided the tax. If their unlawful possession of liquor is detected, then the liquor and vehicle containing it may be forfeited, and the violators punished by criminal action. If the liquor cannot be found for seizure by the State of Georgia, the transgressors may be prosecuted under the criminal laws of the sovereign State of Georgia. There is no basis whatsoever under the laws of the State of Georgia, relied on by the petitioner, for such an action as the one brought in the complaint at bar.

The Court of Appeals below found "Here it is clear that plaintiff predicated her claim on the theory that her cause arose under the Constitution and Laws of the United States". (R-37)

The respondent respectfully contends that no other theory or cause of action is advocated in the complaint. No common-law action at tort for civil damages exists, whereby a State, having sovereign powers for enforce-

ment of law within its territorial limits, may sue, in tort, for civil damages for mere breach of penal laws, or tax laws. It is clear from an examination of the complaint (R-3 and its appendix, R-9), that the legislature of Georgia has not created such an action. The only liability for breach of Georgia's Revenue Act to regulate liquors, is criminal prosecution, or forfeiture of liquor. No personal actions for damages exist at common-law, or by statute, in favor of the State of Georgia.

The respondent respectfully contends that the only action which the complaint purports to set forth, is one for damages for breach of the Twenty-first Amendment and Webb-Kenyon Act.

It is respectfully submitted that when this cause of action was found to have no basis in the Federal constitutional provision, and statute relied upon, then no cause of action whatever was alleged by the complaint, and that the dismissal, by the District Court, on the merits of the Federal controversy, exhausted the possibilities of the complaint.

2. Where the complaint is predicated on the single theory that the cause of action arises under the Constitution and Laws of the United States, and it is determined from the complaint and motion to dismiss that the jurisdictional Federal question does not exist, then the complaint should be dismissed.

The District Court stated:

> "Being of the opinion first stated, I am of the further opinion that this court is not required to retain the case to determine the merits of the plaintiff's claim under the laws of the State of Georgia for the reason the complaint states no Federal cause of action, but relies upon a constitutional amendment and an act of congress from which no cause of action can arise. *Bell* v. *Hood*, 71 F. Supp. 813, 817-821." (R. 22).

The Court of Appeals (R. 37) said:

> "But whether a complaint states a cause of action on which relief could be granted, is a question of law. Here it is clear that plaintiff predicated her claim on the theory that her cause arose under the Constitution and the laws of the United States."

It thus appears that the petitioner's contention that this case requires the attention of the Supreme Court because the decision is in conflict with *Siler* v. *Louisville & Nashville R. Co.,* 213 U. S., 175, and *Hurn* v. *Oursler,* 289 U. S., 238, and similar cases, is not sound.

In the case at bar only one cause of action was alleged and advocated in the complaint. That was a claim for damages in a tort action by a State against the citizen of another State for violation of a constitutional provision and a statute of the United States. The Courts below found that no such cause of action can arise under the sections relied upon for jurisdiction, and the violation of which are alleged as the tort complained of.

Examination of the complaint (R. 3-9), and particularly, examination of Paragraph 4 (R. 3-4), and of Paragraph 7 (R. 5-6), show that twelve (12) residents of Georgia, as well as the respondent, a resident of Illinois, are alleged to have conspired and accomplished the transportation of liquor into Georgia in violation of its laws, cited as an appendix to the complaint. (R. 9)

If a tort action for civil damages exists for violation of the Georgia laws, the record does not show that any such action has ever been brought against these twelve (12) residents of Georgia. Certainly no such cause of action is alleged in the complaint against the respondent.

Since a single cause of action was alleged, and only one remedy sought, based on Federal laws, which did not

authorize or support the action, it was properly dismissed. The Courts below have refused to search the complaint for the possible existence of a State cause of action, which is not apparent on the face of the complaint. This feature alone, distinguishes the case at bar from *Silver* v. *Louisville & Nashville R. Co.,* 213 U. S. 175, and *Hurn* v. *Oursler,* 289 U. S. 238, and the cases following them.

The respondent further urges that proof of a State cause of action for violation of Georgia statutes, resulting in loss of revenue to the State of Georgia, would not necessarily involve proof of violation of the Twenty-first Amendment and of the Webb-Kenyon Act. Mere proof of non-payment of Georgia tax and warehouse charges by fraud, without any proof regarding the manner of importation, would support a claim for the lost revenue, if a personal action for the lost revenue did exist. No proof regarding the manner of importation, or transportation, would be necessary. Thus, there is no substantial identity of right, or proof, in a tort suit for damages for violation of the Twenty-first Amendment and the Webb-Kenyon Act, and a suit for fraudulent evasion of Georgia Revenue Laws.

In all the cases cited by the petitioner on pages 6-10 of the petition, in support of its contention that conflict exists between this decision and the decisions of the Second and Ninth Circuits, a substantial and real Federal question was asserted, and also an apparent question under state or other law was clearly asserted, alleged and relied upon in the complaint. Decisions holding that a Federal Court *may* decide a case on questions other than the Federal questions, where both are asserted or are apparent on the face of the pleading, do not conflict with the decision of the Court below in the case at bar.

No important constitutional issue, not heretofore decided by this Court, is present in the case at bar. The construction and effect to be given to the Twenty-first Amendment, Section 2, and the Webb-Kenyon Act, have been stated in prior decisions relied upon by the Court below. (R. 35-36)

The fact that the State of Georgia is a State of the United States, and may sue a citizen of another State in an original suit in the Supreme Court, will not change the character of the suit brought so that it will be transformed from one not asserting a Federal cause of action, or for that matter, any other cause of action, into a suit over which the District Courts of the United States have jurisdiction.

The petitioner has contended in its petition, at Page 15 thereof, that "The Federal Courts should frame or adjust remedies." The only right of the State of Georgia affected by the Twenty-first Amendment and the Webb-Kenyon Act, is the right to adopt legislation regarding alcoholic liquors without regard for the restrictions of the commerce clause. This is not the right asserted in the complaint, and is not the right for which the petitioner seeks protection or remedy. The right claimed in the complaint has not been created at common law, or by Federal or State Statutes, and does not exist.

The respondent respectfully urges that this Court has refused an injunction sued for by the State of Oklahoma to prevent shipment of liquor into the State of Oklahoma in violation of its laws, on the ground that the Federal Courts will not undertake to enforce State penal laws. *Oklahoma* v. *Gulf, Colorado & Santa Fe Railroad, et al,* 220 U. S. 290. This case was an original action in the Supreme Court of the United States which, of course,

has jurisdiction of actions by States against citizens of other States, without regard to their origin in Federal law. The Federal Courts have stated that they will not undertake to enforce State penal and tax statutes.

People of the State of California ex rel. McColgan v. *Burch,* 129 F. 2nd 421.
Craig v. *Southern Natural Gas,* 125 F. 2nd 66.
Wisconsin v. *Pelican Ins. Co.,* 127 U. S. 265.

CONCLUSION.

The action involved in the case at bar truly is an attempt to secure Federal imposition of a sanction against the respondent, which is not authorized by the laws of the United States, or the laws of any State.

It is therefore respectfully urged that the petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, be denied.

Respectfully submitted,

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Attorney for Respondent.